THE PROPRIETARY PROVINCE AS A FORM OF COLONIAL GOVERNMENT

III.

THAT the transfer of European institutions across the Atlantic occasioned profound and even revolutionary changes in their character, was made evident by our study of the corporate colony of New England. The statement is true, though not to the same degree, of the palatinate. It underwent serious change when it was developed into the proprietary province. A comparison between the province and its medieval progenitor would reveal the fact that, though fundamentally and in outline the same, yet in details of organization they were in very many respects unlike. Differences would appear in the land system, in the official system, in local subdivisions and government, in the administration of affairs in all their departments. The province was by no means an exact reproduction or copy of its original. It was rather the result of a development upon lines broadly suggested by the palatinate. The offspring, if a filial relation in any sense could be affirmed, grew to maturity under physical and social conditions which were very different from those to which the parent was subjected, and corresponding variations of type were the result. This becomes especially clear when we consider the legislature. The medieval palatinate either had no legislature at all, or possessed one in the rudimentary form of the feudal council or *cour de baronie*. But we find the American palatinates, either immediately or within a generation after their establishment, developing legislatures which became not only a permanent, but an increasingly important part of their political systems. Remoteness from England and the impossibility of otherwise securing an adequate revenue made them a necessity. English custom, the trend of English historical development, told almost, if not quite, irresistibly in their favor. Except in the case of New York, the home government sanctioned the establishment of legislatures by the permissive clauses respecting them which were introduced into the charters. Social pressure within the provinces in favor of their establishment was so strong that even the Duke of York, though in a position which made the upholding of the prerogative especially easy and desirable, could not long resist it. From none

of the other post-Restoration proprietors was opposition to the establishment of a legislature to be expected. Penn, especially at the outset, regarded that institution with peculiar affection.

But it is specially to be noted that formally and legally the legislatures in the proprietary provinces were the creation of the proprietors. They were not imposed or even guaranteed by the crown. The language used concerning them in the charters was not mandatory, but permissive. Its meaning was not "he shall," but "he may" legislate, and seek the advice of the freemen or their deputies for that purpose. It was left to the option of the proprietor to determine when, where and how he should exercise this power. The language of the documents implies that the proprietor could legally have refrained altogether from exercising it. It also implies that a legislature was not contemplated as an original and necessary part of the provincial organism. Its origin, that is, is not to be found in the natural or pre-existent rights of Englishmen. The existence of parliament in England did not legally necessitate the existence of assemblies in her colonies, though it greatly increased the difficulties of governing them without assemblies. The legislatures in the provinces then, like all the other organs of their government, developed as the result of social and political causes operating upon the proprietors and in the provinces themselves. Events at once showed them to be the instruments of government which were indispensable to proprietors as well as provincials, and about their development center the events of greatest interest in the history of the provinces. Their study reveals not merely a new phase in the history of the fief, but the operation of forces which were to transform the fief and thus open the way to the growth of modern democratic institutions. The rise of assemblies in the Anglo-American colonies is a fact of profound significance in the history of the world. Its importance will be seen by anyone who takes the trouble to compare events as they occurred in these colonies during the seventeenth century with the trend of historical development at that period, especially on the European continent. It will be my object in this, the concluding paper of the series, to trace the process of their development in the proprietary provinces through its earlier stage.

The form of the legislature in the corporate colony was determined by the organization of the general court of the trading company from which it developed. The form of the general assembly in the province was determined by the concessions of the executive and by the form which the executive had assumed when the legislature reached its full development. The first step towards calling a general assembly was taken by the proprietor, who, if he was not in

the province, instructed his governor to issue writs of election, with such other summonses as might be necessary. The electors to whom these writs were issued were not freemen in the technical sense of being members of a corporation, but were such in the broad and general sense. In the beginning they were literally free men, but the law soon came to define them as freeholders. When met in normal form the legislature consisted of the governor, the council and the assembly or deputies. The latter, who were sent by the localities, constituted the only representative part of the legislature. Its other elements were, as a rule, appointed, were a part of the executive, and were in existence before the legislature met. In both tenure and functions they were legally independent both of the deputies and of the electors. They held their offices at the pleasure of the proprietor, and were or might be guided by his instructions. Engaged as they were in the permanent work of government, they would naturally be swayed by a regard for the interests of the proprietor and by some sense of administrative traditions and needs. Though a component of the legislature the council was also the legal adviser of the governor and through him of the proprietor. As the governor, unless specially limited by law, had the sole power of calling, proroguing and dissolving the general assembly, the council might advise him in such a way as to destroy the body itself or thwart its plans. The joint work of the council and assembly was subject to the veto power of the proprietor or of both the proprietor and his governor. The legislature of the province then differed widely from the general court, though in practice this was somewhat offset by the fact that in the New England colonies the magistrates were in the majority of cases re-elected for a long series of terms. In the province, as in the kingdom, the legislature was in a sense an expansion of the executive, developed out of it and was to an extent controlled by it. Out of this relation arose the possibility of conflict between the two parts of the legislature, that which represented the people and that which represented the proprietor. But we have been describing the general assembly in its normal and regular form. In few of the proprietary provinces did it attain this form at once, in some not at all. It will now be necessary to show through what changes of organization the legislatures of these provinces passed in the early years of their history. In connection with this the degree of influence which the proprietors exerted or attempted to exert over the legislatures will appear. Owing to lack of space it will be impossible in this article to consider the legislatures of any of the provinces except Maryland, Carolina and Pennsylvania.

The policy of the first proprietor of Maryland apparently was to call assemblies frequently, but to control their proceedings by retaining in his own hands the exclusive right to initiate legislation. Not until the close of the disturbed period of the Commonwealth and the restoration to Lord Baltimore of the powers, the exercise of which had been suspended at the advent of the commissioners of Parliament, did the legislature of Maryland assume its final and permanent form. In its early sessions it consisted of only one house, and that was variously organized. Until 1658, so far as the legislature was representative, the hundred was the unit of representation ; but the representative element in the body throughout those years was decidedly fluctuating. For the general assembly of January 1638—the earliest whose records have been preserved—both personal writs and writs of election were issued, but the only one which has been preserved was that directed to Captain Evelyn,[1] commander of Kent Island. It commanded him to assemble the freemen of that locality and to persuade such as he should think fit to attend in person ; the others he should authorize either to go themselves or to elect and send deputies. It was left wholly to the freemen to decide how many deputies they would send, but a record of the election and of all else which was done should be returned to the secretary of the province. The assembly was attended by the governor, the members of the council, the commander of Kent Island, one of his council, two other officials, together with twenty gentlemen and planters and one artisan, all of whom came in response to writs addressed to them personally. The rest of the freemen, so far as they took any action at all, sent proxies, and many of the proxies were held by officials. Those who did not appear either in person or by proxy were fined. Freemen were admitted to seats every day till the close of the session, and the membership roll of the assembly was never closed. The body seems not to have contained a single representative ; it was substantially a primary assembly with the governor as its president. Though summoned in a different way, it to an extent resembled the New England court of election.

But in the legislature of February 1639 the above model was almost wholly abandoned. Elections were held in nearly all the hundreds and the assembly which resulted was largely representative. Individual writs were apparently sent to only three besides the members of the council. Two were admitted without election or special writ.

From this time until 1650 the legislature of Maryland fluctuated

[1] *Arch.*, Assembly, 1638 to 1664, p. 1.

in its organization between the primary and the representative form, while a small proportion of the members attended in response to personal writs. The general assembly of October 1640, which was continued by prorogation until March 1642, was almost wholly representative. The councillors were personally summoned,[1] Thomas Cornwallis sending an attorney or proctor in his stead. But in March 1642, possibly because of the religious dissensions[2] then beginning in the province, writs of election which had already been issued were superseded by a proclamation of the governor requiring all freemen either to attend personally or to send proxies. This was obeyed, and the legislature which resulted was organized substantially as that of 1638 had been. In July 1642 writs of election were issued,[3] and personal writs were sent to nine individuals. Elections were held and burgesses returned from all the localities of the province. No proxies seem to have been sent to this assembly save one or two by those who were personally summoned. A natural result of the adoption of this form of organization was the proposal made by Robert Vaughan in the name of the burgesses, that the general assembly should be divided and the representatives sit by themselves and have a negative voice ; but the governor would not agree to it. The unsettled condition of affairs was again shown when a new general assembly was called in September 1642. Under the authority of the governor's proclamation the proxy system was entirely restored.[4] In this body there seem to have been no representatives. Persons to the number of 182 were entitled to seats, of whom 18 were individually summoned, 88 attended without personal summons or sent proxies, and 76 were fined 20 lbs. of tobacco each because they failed to be present. The proxy system seems to have been retained till 1644.[5] Records of the sessions between April 1644 and December 1646 are lacking. The general assembly of the latter date contained burgesses, and one would infer from the fragmentary record which remains, that it consisted of two houses. But in January 1648 the representative system[6] was again abandoned, and in that body there is no trace even of personally summoned members. The general assembly held by Governor Stone in April 1649, the same one which passed the famous act concerning religion, seems on the other hand to have consisted of council and burgesses.[7] In the proclamation by which the assembly of April 1650 was summoned, it was left to the option of the freemen to

[1] *Arch.*, Assembly, 1638 to 1664, p. 89.
[2] Ibid., pp. 114, 115.
[3] Ibid., p. 129.
[4] Ibid., p. 167. Bozman, II. 232.
[5] Ibid., pp. 201, 205, 209.
[6] Ibid., p. 214.
[7] Ibid., p. 238 *et seq.*

choose delegates or to attend by proxy.[1] All the hundreds now showed their preference for the representative system by electing burgesses. This legislature did not stop there, but as soon as it met organized in two houses and passed an act confirming what it had done. This, as it proved, committed Maryland permanently to the representative system and to the normal provincial legislature of two houses, the upper house consisting of the council, presided over by the governor, and the lower of the burgesses.

But we have said that at the outset it was the intention of Lord Baltimore to control the proceedings of his legislature, not only by his right of appointing and instructing the governor and the members of the upper house and by the veto power which he reserved wholly to himself,[2] but by retaining in his own hands the exclusive right to initiate legislation. He attempted at the beginning to exercise this power on a large scale. Whether his rejection of all the acts of the general assembly of 1635 was due to the fact that they originated with that body, we cannot tell. But he caused to be submitted to the general assembly of January 1638—the second legislature which met in the province [3]—a series of twelve bills which he desired to have enacted. These were read and debated, and finally by a majority of members, led by Captain Cornwallis, they were rejected. Only the votes of the governor and Secretary Lewger, and the proxies which they held, were cast in favor of their passage. When it was now proposed that some laws should be passed which should be in force till word came again from England, the governor denied that the legislature had such a power; they must in the interval be governed by such of the laws of England as they had the right to enforce. But before many hours had passed, his ideas were modified and he was ready even to advise that a committee be chosen to draft bills.[4] From this time the process of legislation continued without serious interruption till the close of the session, when a number of important acts were passed.[5] All of these, however, were rejected by the proprietor, probably as an assertion of his claim to the right of initiative.[6] But before the general assembly of the next year met Lord Baltimore apparently became convinced that it was unwise, if not useless, to contend longer for the right in the extreme form in which he had asserted

[1] *Arch.*, Assembly, 1638 to 1664, p. 259 *et seq.*, 272.

[2] *Arch.*, Council, 1636 to 1667, pp. 51, 111, 154, 203, 543; Assembly, 1666 to 1676, pp. 161, 173 *et seq.*

[3] *Arch.*, Assembly, 1638 to 1664, p. 6 *et seq.*

[4] Ibid., pp. 9, 10.

[5] Ibid., pp. 14–24.

[6] Bozman, II. 67.

it. Therefore, after organization, the first business of that session was to listen to a letter in which the proprietor authorized the governor to assent to acts originated and passed by the general assembly, and declared that they should be in force in the province till Lord Baltimore or his heirs should express their dissent.[1] An act declaring the substance of this concession as it applied to the existing assembly was at once passed. When the commission of the governor was renewed in 1642[2] the concession was repeated by the proprietor. Still this in his opinion did not deprive him of the right to initiate legislation, for in 1649 he sent over under his great seal sixteen bills which he instructed the governor to lay before the assembly for its acceptance *in toto* as perpetual laws.[3] We know that these bills were elaborate and that they concerned the most important interests of the province. The general assembly declined to accept these as a whole, but selected such as seemed to it best to promote the interests of the province, while it added certain acts of its own. Among those which it accepted was probably the famous toleration act of 1649. Thus the independence of the legislature, so far as was possible under the Maryland system of government, was attained. But from time to time, so long as provincial government continued, protests were uttered against the veto power of the proprietor. The lower house also expressed its jealousy of the upper house as an outgrowth and embodiment of proprietary influence. In 1660 Josiah Fendall and others tried to restore the single chamber, to make the speaker of the lower house its president and to abolish the veto power.[4] This was defeated by the efforts of Philip Calvert, who naturally soon succeeded Fendall as governor. A list of grievances presented by the lower to the upper house in 1669[5] included a complaint that the proprietor retained exclusively in his own hands the right to approve or reject laws and a petition that this power might be bestowed on the governor because, while in office, he must be a resident of the province. But this the upper house opposed as inconsistent with the charter and involving danger to the power of the proprietor. Among the charges presented against Lord Baltimore[6] were these, that he assumed the right to assent to and repeal laws, to proclaim and dispense with laws as he saw fit, and that while not a resident in the province. This naturally was coupled with the other charge, that he assumed the

[1] *Arch.*, Assembly, 1638 to 1664, p. 31.
[2] *Arch.*, Council, 1636 to 1667, p. 111.
[3] Ibid., p. 220; Assembly, 1638 to 1664, p. 263.
[4] *Arch.*, Assembly, 1638 to 1664, pp. 389, 390, 420 *et seq.*
[5] *Arch.*, Assembly, 1666 to 1676, p. 173 *et seq.*
[6] Maryland Entry Book, No. 52, p. 189 *et seq.*

royal style, dignity and authority. The history of Maryland, both in the seventeenth and in the eighteenth century, will show that the main line of cleavage in the provincial system was that by which the upper house and the higher officials on the one side were divided from the lower house and the common people on the other.[1]

As in the case of the executive so in that of the legislature the writer who would trace the early development of Carolina institutions will be perplexed by the lack of accessible material. But from a comparison of such authentic documents as remain and are in print one would infer that the course of development in that province was substantially as follows. The persuasions of the Barbadians and the eagerness of the proprietors to secure settlers occasioned, we may suppose, the insertion in the Concession and Agreement of 1665 of the very liberal provisions concerning a legislature.[2] Under a writ issued by the governor in the name of the proprietors an election was to be at once held for the choice by the freemen of deputies, who should meet with the governor and council in general assembly. Sessions of this body should be held annually thereafter. It was given power to appoint its own times of meeting; to adjourn at and to such times and places as it chose; to pass all laws, establish courts, fix the limits of their jurisdiction, the number of their officers, their fees and salaries; to lay all taxes and provide for all the expenses of government; to erect baronies and manors, divide the province into counties, hundreds and parishes; to erect ports, build towns and cities and provide for their defense; to establish a militia and provide for offensive as well as defensive war with foreigners as well as with Indians; to provide for naturalization; to designate the amount of land to be granted to individuals and to make rules for the issue of such grants; to enact all other necessary laws. In the exercise of administrative powers the governors and councillors were to be guided by and to execute in detail the laws passed by the assemblies; they were also to see that all subordinate officials obeyed and enforced them.

The difference between this document and any which Lord Baltimore issued is very noticeable. Apparently the intention of its framers was to make the general assembly at the outset the chief organ of government in the province. To the governor and council as an executive was left simply the work of executing its commands. The proprietors seem to have had no thought of reserving the right of initiative. The judicial, the military and the financial systems,

[1] A notable utterance of the extreme popular feeling against the proprietor and his agents at the time of Bacon's Rebellion is contained in the *Complaint from Heaven*, a pamphlet printed in *Arch.*, Council, 1667 to 1688, p. 134 *et seq.*

[2] *N. C. Recs.*, I. 77, 79, 81, 98, 144, 148.

with the organs of local government, were to be created by legislation. Had this scheme been carried into full operation the governments within Carolina would at once have assumed the form which the provinces generally did not reach till some time in the eighteenth century. There is evidence that an assembly was held by Governor Yeamans at Cape Fear in the summer of 1666,[1] but of its organization we know nothing. The instructions which were issued to the governor of Albemarle in 1667 included the provisions of the agreement concerning assemblies,[2] but there is no proof that a legislature met under them.

With the issue in 1669 of the Fundamental Constitutions a change appears in the policy of the proprietors respecting the legislature. An effort was now begun to bring it into greater harmony with the earlier traditions of the county palatine, with the feudal type of government the acceptance of which the proprietors through the Constitutions sought to enforce. For the name general assembly was substituted that of parliament. Provision was made that it should meet biennially and that it should consist of the proprietors, or their deputies, the provincial nobility and one representative from among the freeholders of every precinct. The electors should possess fifty acres of land each, and the property qualification of the representative should be the ownership of five hundred acres of land lying within the precinct for which he was chosen. The members should sit and deliberate together, but vote in four distinct estates. If the majority of any one of the four estates—the proprietor's deputies, the landgraves, the caciques, the representatives—should vote that a measure was not consistent with the Fundamental Constitutions, it should not pass. Provision was also made that all matters which were to be brought before the parliament should be prepared in and approved by the grand council. This body consisted of the proprietors resident in the province (or their deputies) and the councillors of the proprietors' courts. As in Maryland, so in this plan, the right of initiative was thus reserved by the executive. The palatine court was given the right to negative acts of the parliament, except in two cases, and no act of the parliament should go into force till ratified by the palatine or his deputy, and by three of the other proprietors and their deputies. Moreover, the legislative sphere of the parliament was much less broad than that of the general assembly as specified in the Concessions of 1665. There is no recital of its powers in the Constitutions, but from the provisions of the document in general it appears that it was to have only the formal power to regulate the granting of land,

[1] *N. C. Col. Recs.*, p. 145. [2] Ibid., p. 167.

the erection of manors and baronies, the establishment of offices and courts, the making of war, and the doing of other things which were specified in the concessions as within the sphere of the legislature. It did vote taxes, and that of course was a powerful lever, but the evident intention of the framers of the Constitutions was, by the creation of machinery above it, to reduce the power of the Carolina legislature to a shadow.[1] It will, however, be said that this intention was defeated, because the proprietors found it impossible to put the Constitutions into operation. But there is evidence that their instructions so modified the powers of the legislature that for a considerable time it failed to recover the fullness of authority which had been granted to it in 1665.

By the instructions of 1670,[2] the governor of Albemarle was ordered not only to issue writs for the election of five freeholders from each of the four precincts of the county, but to admit five deputies of the proprietors, and these, with the representatives, were to form the assembly. This body, which was to have a speaker, should choose five persons, who, together with five designated by the proprietors, should form the council. This council was to occupy as nearly as possible the position of the grand council, as provided in the Constitutions, and that meant that it should have the sole initiative in legislation. In its capacity as council and also as palatine's court it likewise had control of the entire work of the administration, especially of defense, and it later acquired the power, in co-operation with the governor, to adjourn, prorogue and dissolve the assembly.[3] It thus appears that an assembly called and regulated in accordance with these instructions would be in a position quite different from that indicated in the Concessions. The instructions to the governors of Albemarle till 1691 provided that assemblies should be held according to this plan.[4] We do not know whether the instructions were obeyed or not, for the proceedings of these sessions have been lost; but the organization just described was certainly the only one authorized by the proprietors at the time, and if the instructions were not obeyed it was due to the inability of the proprietors to enforce obedience to their will. Respecting the initiative their claims and commands were similar to those of the proprietor in the early history of Maryland. When in 1689 Philip Ludwell was appointed governor of Albemarle, he was instructed as soon as was convenient to call an "assembly or parliament," and in the passing of laws to "observe the methods prescribed by our

[1] *N. C. Recs.*, pp. 193, 196, 199 *et seq.* Art. 33, 51, 73–79.
[2] Ibid., p. 181.
[3] Ibid., 193, 239. Bassett in *Johns Hopkins University Studies*, XII. 52.
[4] Ibid., I. 235, 333.

Fundamental Constitutions and instructions."[1] The acts should be sent to England for approval or disapproval by the proprietors. A fair interpretation of this would lead to the inference that this assembly, if held, should be organized as its predecessors were required to be by the instructions of 1670. But by the instructions of 1691, which were issued to Ludwell as governor of the entire province, no reference was made to a reservation of the right of initiative, though it was ordered that the legislature should consist of deputies, landgraves, caciques and delegates. Measures passed by them and approved by the governor and three or more of the proprietor's deputies should continue in force for two years, and no longer unless within that time they were confirmed by the Lords Proprietors. According to these instructions the deputies of the proprietors were to be the governor's council, as well as a component of the legislature. Of the intended assembly, if held, no records are at hand.

Of the organization of the legislature in North Carolina during the remainder of the proprietary period we have no knowledge, but we have no reason to suppose that the proprietors longer attempted to exercise the right of initiative there. In May 1694 Governor Thomas Smith, who was Ludwell's successor in South Carolina, announced that the proprietors had consented "that the proposing power for the making of laws, which was heretofore lodged in the governor and council, is now given to you (the commons) as well as the present council."[2] No provision appears in the edition of the Fundamental Constitutions which was issued in 1698 which is inconsistent with this statement.[3] Apparently, then, since the council had come to consist of the proprietors' deputies, and since the proprietors had not been able to establish a nobility or to introduce much, if any, of the machinery of government which was intended to accompany it, the conclusion must be that the legislatures in the Carolinas assumed before 1700 the form customary in the provinces, and that they exercised substantially the same powers which legislatures elsewhere in that form of colony enjoyed.

The legislature of Pennsylvania was founded under authority transmitted through the Frames of Government of 1682 and 1683, and the Charter of Privileges of 1701. Of these the first was issued by the proprietor in agreement with those who, though still resident in England, intended to purchase land in the province; the second was issued by the proprietor after his arrival in Pennsylvania; the

[1] *N. C. Col. Recs.*, p. 363.
[2] Rivers, *Sketch of the History of South Carolina*, p. 171.
[3] *N. C. Recs.*, II. 852 *et seq.*

third was issued by him just before the close of his second visit to the province. A third so-called Frame of Government was passed by Governor Markham, in 1696, with the approval of the legislature, as an act of settlement, but as it was never accepted by the proprietor it can be said to have been in force only as a temporary act. Moreover, no evidence has been found that the Frames of Government were ever submitted to the king for his approval. But as the charter did not declare that the acts which were not submitted should be on that account annulled, those issued by Penn and approved by the legislature must be regarded as in force in spite of the irregularity. Unlike the schemes of government issued by the Carolina proprietors, those of Penn went fully into operation; he procured popular acceptance of them at the outset.

The existence of a representative system, and one, too, which was unusually developed, was guaranteed from the first by the Quaker proprietor. The statement was made in the first Frame that powers of government were vested in the governor and freemen, those of the latter to be exercised in two representative bodies, the council and the assembly. The fact that both houses of the legislature were to be elective and representative marks another important departure from the traditional system of the province. It was a concession to the popular elements in the system which involved serious consequences for the proprietor and from which proceeded many of the complications of the first two decades of Pennsylvania history. It also contributed in an important degree toward determining the form which the legislature of that province ultimately assumed.

According to the first Frame of Government the full provincial council should consist of seventy-two members. The assembly of the first year should include all the other freemen among the colonists, who should be called together to accept the laws and cooperate in the establishment of government. Thereafter, it should consist of two hundred members. Both bodies should be annually chosen and the elections for both should be held at the same times and places.[1] A faint attempt was made to secure for the council the position of an aristocratic body, one more likely than the assembly to act in harmony with the proprietor, by the requirement that those of best repute for wisdom, virtue and ability should be chosen as its members. It was apparently hoped that over this body, though elective, the proprietor and governor would be able to exert controlling influence, for it was given the exclusive right of initiating legislation and of summoning and dissolving the general

[1] Elections for both houses were held by counties.

assembly. The lower house, or assembly of two hundred members, though it was also elected by the freemen, was given a decidedly inferior position. Its functions were to impeach offenders before the council, to prepare amendments to the bills laid before it and finally to approve or reject those bills. The governor was not given the right of veto, or of performing any act of government independently of the council; neither could he adjourn that body or its committees. He had only a triple vote in the council. How, then, was it possible that more than an ineffective moral influence could be exerted by him? His legal position in the legislature was much more like that of the governor of the corporate colony than like that of the chief magistrate of a typical province. The weakness of the governor and the prominence of the elective council were then the chief features of the legislative system as devised by the Quaker proprietor.

As is well known, the first Pennsylvania legislature, that which met at Chester, December 4, 1682, consisted of only one house.[1] Writs were not issued for the election of a council, while only seven members were chosen from each of the six counties into which the province and "Territories" were then divided. The *Votes* show that the organization and procedure of this body were in accordance with accepted forms, that it enjoyed all necessary independence, and that it did a large amount of legislative work. The writs which Penn issued for the election of 1683 called for a provincial council of seventy-two members, but the returns from the counties were accompanied by petitions that the twelve who had been chosen in each county might serve both as councillors and as assemblymen.[2] It was now so clear to all that the legislature as planned was far too large for the needs and resources of the province, that the proposal of the petitioners was at once accepted by all concerned, though it involved a departure from the Frame of Government.[3] The lower house of this legislature now demanded the right of initiative and the question was discussed by the members and with the proprietor at some length,[4] but nothing was accomplished. Enough changes, however, had been made to justify, in the opinion of all concerned, the issue of a new Frame of Government; but by the Frame of 1683 no organic changes were introduced into the system.

The proprietor now returned to England, leaving the executive power in the hands of Thomas Lloyd, as president, and of the provincial council. The membership of the council had been fixed at eighteen, and in addition to being the executive it constituted the

[1] *Charter and Laws of Pa.*, p. 473.
[2] Ibid., p. 484.
[3] *Col. Recs.*, I. 58.
[4] *Votes*, I. 7.

upper house of the legislature. Disputes soon arose between it and the assembly over the form of language used by the council in the promulgation of bills which were to be considered in the forthcoming sessions of the legislature. The form "by the authority of the president and council," or its equivalent, was thought to violate the charter and to ignore too much the lower house.[1] This controversy continued during 1685 and 1686,[2] stopped the course of legislation, and revealed the importance both of the executive and of the lower house. Of the eighteen members of the council usually only five or seven were present at its sessions; at times less than the required quorum of one-third. The reports which came to the proprietor convinced him that the executive was not properly organized, and in 1687 he made it again appointive and reduced its membership. He selected five "commissioners of state"[3] and instructed them, or any three of them, to compel the members of the provincial council to attend to their duties, to suffer no disorder in it or in the assembly, to inquire into their past acts and into the qualifications of members of both houses, and to abrogate all that had been done during his absence. They were also to execute the laws and to approve or veto the acts of the legislature as the proprietor might do were he present. In his irritation the proprietor threatened to "dissolve the frame without any more ado." "Let them look to it," said he, "if further occasion be given."

But the relations with the lower house were no more amicable than they had been before this change, while the sessions of the council were no better attended than they had previously been. The lower house was jealous because it did not possess the right of initiative, while the council irritated it by insisting on its own superiority. In the session of May 1688, as had been the practice since the proprietor left the province, the lower house neglected to present its speaker for approval.[4] It also took separately the oaths of allegiance and fidelity, and resolved not to divulge any of its proceedings. At first the provincial council was inclined not to recognize it as a house, and after legislation began, bickerings continued throughout the session.

On account of the unsatisfactory condition of things the proprietor again interposed, and before the end of 1688 appointed Captain John Blackwell governor.[5] The commissioners of state were thus superseded, and a stranger and a man of military training was

[1] *Col. Recs.*, I. 133 *et seq.*
[2] *Charter and Laws*, 498 *et seq.*
[3] Proud's *Hist. of Pa.*, p. 305. *Col. Recs.*, I. 212. *Charter and Laws*, 514.
[4] *Votes*, I. 43, 44, 46. *Col. Recs.*, I. 223.
[5] *Col. Recs.*, I. 229.

introduced as the head of the government. It was not unnatural that the late commissioners should be dissatisfied, and as they were all men of influence, they could make much trouble for a man who was situated as Blackwell was. Alone, unaided, he had to face an elective council and a legislature, the members of which were either indifferent or strongly prejudiced against him. An executive in such position must needs be helpless, and, if William Penn really desired to retain the proprietary form of government, it is evidence of his poor judgment that he should have allowed the executive to be thus compromised and weakened.

The new governor first attempted to secure a more regular attendance on the sessions of the provincial council. At its second meeting[1] after his arrival a quorum was not present. By a special effort a quorum, but no more, was brought together at the next session, January 14, 1689.[2] It was then ordered that the sheriff should acquaint the members of the council who resided in their respective counties, that one of them should attend each month as required by the law and charter. But at the session on January 28, a quorum was not present, and no business could be done. The same was true on the 31st, and after waiting two hours those who were present departed.[3] On March 1 all the members from Chester County were present, and the governor asked them to agree among themselves as to the order of their future attendance, and to inform the secretary. Thereupon one of them, John Symcock, who had also been one of the commissioners of state, declared that he would not attend,[4] and left the duty to be performed by the other two. On March 4, no quorum was present; the same was true on the 11th. On the 12th, when six were present, the governor stated that the means he had used to secure attendance had failed, and that he asked the advice of the council in the matter. At his request the question was put, whether it were not the duty of one of the members elected for each county to "constantly attend the Governor in the affayres of the Government." Though such a proposition would seem to be fair and moderate, it was debated and its decision postponed till some six weeks later.[5] With this the governor was not satisfied, and later repeated the question of the former session. After much debate and expression of unwillingness to advise the governor in the premises, Arthur Cook, who also had been a commissioner of state, declared that the poverty of the people was so great that they could not bear the charge of constant atten-

[1] *Col. Recs.*, I. 229.
[2] Ibid., p. 230.
[3] Ibid., p. 233.
[4] Ibid., p. 234.
[5] Ibid., p. 238.

dance, as the law required, and proposed that the governor be requested to suspend for the present the execution of the requirement. This resolution passed in the affirmative, the secretary only dissenting. This shows pretty conclusively that Penn's plan of a large executive council, which should be elective, had failed, and through its failure the conditions were prepared for a bitter quarrel between the governor and the council.

Such a quarrel had in fact already begun and it proceeded by sure and rapid stages until it culminated in a dead-lock between the governor and the council. In the *Colonial Records* its progress can be traced step by step. Thomas Lloyd, whom Penn had left as president of the colony, retained the great seal and was from the first the leader of the faction which opposed the governor. Though requested by the governor and council at the beginning of Blackwell's administration to surrender the proprietary instructions and other important documents [1] he refused or neglected to do so. He refused to affix the great seal to commissions and public orders issued by the governor.[2] When about to visit New York he refused to leave the great seal in the custody of the governor and council, and maintained that he had a "fixed estate" in it.[3] This occurred at the very time when Blackwell failed in his efforts to secure an adequate attendance of the council, and throughout its sympathies were evidently with Lloyd. The state of feeling was speedily shown by a dispute between the governor and Samuel Richardson, a member of the council, over the question whether or not a certain petition should be received. Richardson and Arthur Cook [4] then repudiated the governor's authority, saying that the proprietor only had authority to appoint a deputy. When, because of his insulting language, Richardson was ordered by Blackwell to leave the room, he refused, saying "I was not brought hither by thee and I will not go out by thy order; I was sent by the people and thou hast no power to put me out." Though the council supported the governor to the extent of ordering Richardson from the room, executive power was challenged in the most direct manner by this event. When Blackwell, apparently in conformity with the Frame of Government and with the laws,[5] sent to the chancellor a list of appointees for provincial judgeships, he refused to affix the seal to their commissions, alleging that these documents were "more

[1] *Col. Recs.*, I. 230, 234, 238, 239.

[2] Ibid., p. 231.

[3] Ibid., pp. 234–237.

[4] Ibid., p. 243.

[5] Ibid., p. 249; see also p. 45, Art. 16 of the Frame of Government of 1683; *Charter and Laws*, pp. 168–178.

moulded by ffancy than fformed by law." The council failed again to support the governor effectively, and he was thwarted in his effort to appoint judges and open the courts.

At the spring election of 1689 Thomas Lloyd and Samuel Richardson were returned as members of the provincial council.[1] The governor tried to exclude them on the ground of their offensive conduct, and presented a series of charges against Lloyd looking toward his prosecution. This aroused a hot debate, which soon after was revived by the publication of what was presumably an attack on the governor, and which was traced to Joseph Growdon, another member of the council.[2] Growdon refused to withdraw at the command of the governor while this matter was being discussed, and a general cry was raised that the members who had been elected, but from whom the governor withheld their seats, should be admitted. Thereupon occurred the sharpest debate among those reported. But the governor remained firm. He adjourned the council and a quorum did not again appear till several days after the date (May 10) for the opening of the session of the general assembly. Naturally the lower house, when it met, sympathized with those whom the governor had excluded from their seats in the council. As this was an obstacle in the way of securing the attendance of a quorum of the council, and hence contributed towards making the organization of the legislature impossible, the exclusion of the councillors was presented as a grievance[3] and its redress was demanded. When the session actually opened the governor defended his policy and office in a long speech, but, owing partly to the disputes, he and the council had no bills to propose. Therefore no new laws could be passed that session. An irregularity already committed in not passing laws under the great seal seemed to invalidate all in existence save the Frame of Government and the Act of Union with the Lower Counties. The proprietor had also ordered the repeal of the existing laws and their re-enactment with amendments. But such was the state of feeling within the legislature, that even this was impossible. After wrangling for a week or a little more over the detention in custody of one who had been elected a member of the lower house from Newcastle County, the assembly broke up without formal adjournment. With difficulty the governor then procured from the council a declaration that the existing laws should remain in force and should be executed by the officials of the province. With this the important business of Blackwell's administration came to an end.[4] He had in a faithful

[1] *Col. Recs.*, I. 267 *et seq.* [2] Ibid., 278 *et seq.* [3] *Votes*, p. 50.
[4] See Blackwell's closing speech, *Col. Recs.*, I. 312.

and straightforward manner upheld the cause of the executive, but against an opposition which was far too strong for him.

In the arrangement made for the continuance of government Penn made another notable surrender to the dominant forces in the province. Finding it impossible for him to return, he sent two commissions between which he permitted a choice.[1] One provided that the provincial council should present three names from which the proprietor should select his governor, and that in the interim an official elected by the provincial council should act in that capacity. The other commission provided that the provincial council itself should act as executive, and to that end should from time to time elect for itself a president. Penn wrote that he threw all into the hands of the provincials, that they might see the confidence he had in them and his desire to give them contentment. Relying, as usual, on moral influence, he exclaimed in closing, "What Ever you do, I desire, beseech and charge you all to avoyd factions and parties, Whisperings and reportings and all animosities that putting your Common Shoulder to the Publick work, ye may have the Reward of Good men and Patriots." The colonists at once chose the second alternative that was offered. The provincial council again became the executive, and Thomas Lloyd was chosen president. The opposition against which Blackwell had struggled was again fully installed in power, and that with the consent of the proprietor. Within the province there was now no obstacle to the assertion of the will of the provincials through the legislature. The executive had been subordinated to it. So long as that condition lasted conflict of course was impossible.

The suspension of Penn's governmental powers in 1692 and the appointment of Benjamin Fletcher, of New York, as royal governor of Pennsylvania, came as a rude shock to the dominant party in that province. Fletcher properly considered that the Frame of Government was superseded by his commission. The elective council at once gave place to one appointed by the governor and subject to approval by the king.[2] The councillors were also placed upon the commissions of the peace throughout the province. The number of members both in the council and in the lower house was considerably reduced. But the introduction of the forms and usages of the royal province resulted in one important gain for the lower house; it secured to it the right to initiate legislation. This doubtless in a measure reconciled the assembly to other changes.

[1] *Col. Recs.*, I. 315 *et seq.*

[2] Ibid., p. 364, 366, 369. See Fletcher's statement on p. 402 of the difference between Penn's system and that of the normal province.

When now Fletcher attacked the validity of the entire body of laws on the grounds that they had not been properly enrolled or published under the great seal, that they had not been submitted to the king, that some of them were inconsistent with the laws of England,[1] the assembly readily undertook the work of revision. They succeeded in saving the body of earlier legislation and in adding somewhat to it.

When late in 1694 the powers of government were restored to the proprietor,[2] William Markham was again appointed his deputy governor. The elective council was restored,[3] and many of its former members were returned. But the rule of the Frame of Government concerning the time for holding the session of the general assembly was at once departed from. As soon too as the council was called to consider what bills should be laid before the assembly,[4] it began to discuss the possibility of substituting for the existing Frame of Government another which should be "more easie." No bills were prepared or promulgated. When the legislature met both houses violated the Frame[5] by resolving that, considering the emergency, they might proceed to legislation without the promulgation of bills. Continuing thus the practice of the Fletcher *régime*, it was decided that both houses might initiate legislation. An attempt was then made to pass a revenue act and an act of settlement, the latter of which should embody the new principle of initiative by the lower house. But Markham refused to pass the bills, and the session closed without definite result.

But Markham seems by this time to have become convinced that, since the Frame of Government had been superseded by the appointment of Fletcher, it could not be reassumed without legislative authority.[6] To this he could not resort without advice from the proprietor. Hence, in order to strengthen the executive, he substituted[7] an appointive for an elective council. An assembly was then called for the special purpose of appropriating a sum required by the queen for the defense of New York. That body, more decisively than its predecessor, coupled supply with settlement as mutually conditioned. The result of a conference was a presentation by the governor of a draft of a bill of settlement.[8] The assembly

[1] *Col. Rec.*, I. 405 *et seq.* Note especially, for the government side of the question, the speech of Patrick Robinson, p. 419.

[2] Ibid., p. 472 *et seq.*

[3] Ibid., p. 482 *et seq.*

[4] Ibid., p. 484 *et seq.*

[5] Ibid., p. 491.

[6] Ibid., p. 505.

[7] Ibid., p. 497.

[8] Ibid., pp. 507, 508.

brought up with it a bill for the required appropriation, and the two became law together November 7, 1696. Thus came into existence the act of settlement, which was properly known as Markham's Frame of Government.[1] Beside the retention of the elective council, its most important feature was the guarantee to the lower house of the right to initiate legislation. This was the first time that the principle was incorporated into an act of the Pennsylvania legislature. But the act itself declared that it should remain in force only until the proprietor should signify the contrary, while the evidence is satisfactory that Penn never confirmed it. Thenceforward however the lower house, as well as the council, regularly initiated legislation.

When in 1700 Penn paid his second visit to the province the discussion of the organization of the legislature was resumed. The opinion was then expressed in the council that the Frame of 1683 was still in force "as to its fundamentals."[2] Penn said that Markham's frame had served till he came, but it could not bind him against his own act, *i. e.*, the Frame of 1683. The council then resolved to read both Frames, "and to keep what's good in either, to lay aside what's inconvenient and burdensome, and to add to both what may best suit the common good," and to present the same before the proprietor. With the discussion of this, which was continued at intervals for several months, was connected the revision of the laws of the province and the passage of an act concerning property. In the last named act the assembly was especially interested. The results arrived at on all these questions evidently proceeded from the joint action of the proprietor and the legislature, and the two co-operated freely at all stages of the discussion. The result was embodied in the Charter of Privileges of 1701.[3] In Articles II. and III. of this document the proprietor fully recognized the independence of the assembly, and by implication also the fact that it should be the only house of the legislature. This inference appears to be justified by the absence from the Charter of Privileges of a provision for the election of any except members of the assembly, and by the appearance a few days later of a commission appointing the members of the council and giving them only administrative powers. As a matter of fact, too, the council thereafter could not exercise legislative powers. It constantly advised the governor concerning proposed legislation, bills were discussed and law-making was influenced by it, but it did not legislate.

The events which we have just outlined present another striking illustration of the difference between Pennsylvania and the other

[1] *Col. Recs.*, I. 48. [2] Ibid., p. 596 *et seq.* [3] *Col. Recs.*, II. 56.

proprietary provinces. Penn, instead of claiming for himself a special right of initiative, committed it wholly to a large executive council. By making his council elective he at once transferred a very large share of the executive power into the hands of the people. This soon involved the proprietor and his governor in such difficulty, caused such confusion in the regular work of the administration, that by 1700 the necessity of an appointive council must have become obvious to those who had the rights of the proprietor and the permanent interests of the government at heart. But in order to secure it Penn apparently had to concede that the council should possess no legislative power. Thus, unlike the other provinces, the legislature of Pennsylvania came to consist of the governor and one house, that of the assembly.

Having now briefly shown what was the nature of the proprietary province on its territorial and its governmental side, what was at the outset the organization and work of the executive within it, through what changes the legislature passed on the way to the assumption of its final form, it remains by way of conclusion to make one brief statement concerning the position occupied by this form of province in the general course of our colonial history. It will probably be found to have been the least successful among the forms of colonial government and, for that reason, to have had less of the elements of permanence than the others. It was less successful and less permanent than the corporation, because the natural tendency of small frontier communities, like those which existed in these colonies, was toward a democratic organization and a high degree of local independence. That demand the corporation furnished the means of satisfying, while the presence and power of a proprietor and of his agent obstructed the working of this tendency and caused irritation and conflict. As the cause of this conflict was organic, if there was any vigor of political life the conflict must, at least at intervals, continue until either the proprietor or the assembly was definitely and forever master. That the proprietor could become an autocrat is not in any case supposable; his resources were not equal to that, the rights he received from the king would not admit of it. In the long run the executive was bound to appear as the weaker element in this system and must be gradually forced to the wall.

But the proprietor was in danger from another quarter. His province was a special jurisdiction. The powers exercised within it were so much subtracted from the imperial rights and dominion. Hence, it was an obstacle in the way of the complete assertion of royal and parliamentary control over the colonies. That control could be effectively exercised only through the royal province.

Hence with the development of conditions which made the assertion of that control a necessity, it would soon be seen that both the corporation and the proprietary province should give place to the royal province. The history of our colonies shows that tendency in actual operation, and the proprietorships presented a far less united and determined front against it than did the corporations. The proprietor was between two fires—the people and the king—and what the one left the other was likely to consume. He was, therefore, not infrequently willing to sell or surrender his rights to the crown and thus escape from the hopeless conflict. The political structure of which he was the head was thus naturally transitional, and was destined in the course of events to pass away.

HERBERT L. OSGOOD.